[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TOLUB Justice PART 15

Index Number : 100443/2006

MOMENI, ISMAEL

vs.

SHURGUARD STORAGE CENTERS

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 10.17.09

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IN ACCORDANCE WITH

IS DECID[illegible]

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 24 2009

COUNTY CLERK'S OFFICE

NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/15/09

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

----------x

ISRAEL MOMENI

Plaintiff,

-against-

SHURGUARD STORAGE CENTERS, INC. and THE METROPOLITAN TRANSPORTATION AUTHORITY

Defendants.

----------x

Index No.
Mtn Seq.

WALTER B. TOLUB, J.:

This action for property damage arises out of plaintiff's claim that his property, stored in a storage unit belonging to Shurguard Storage Centers, Inc., ("defendant"),[1] was damaged by water in July of 2005.

By this motion, defendant moves for summary judgment pursuant to CPLR 3212. Alternatively, defendant seeks partial summary judgment and an order limiting their liability, if any, to a maximum of five thousand dollars ($5,000) as set forth by the terms of the storage unit lease. Plaintiff, in opposition, cross-moves for an order striking a multitude of the affirmative defenses advanced by defendant, including those which involve claims of liability limitation under the lease agreement dated

[1] Plaintiff's submissions represent that settlement has been reached with co-defendant, the Metropolitan Transportation Authority. For simplicity, defendant Shurguard Storage Centers, Inc. is therefore referred to as "defendant" for the purpose of this motion.

May 6, 2003; defenses arising in connection with "insurance requirements" of the lease addendum; and the affirmative defense of lack of standing.

Background

Plaintiff is involved in the business of selling rare rugs and carpets. In May of 2003, plaintiff went to defendant Shurguard Storage Centers, Inc. in Long Island City to obtain a self-storage unit. Defendant issued, and the parties executed, a written "self-storage unit" lease agreement and a "lease addendum" (collectively, "the storage unit lease") for storage unit 1046 ("the storage unit").

By the terms of the executed agreement, plaintiff represented that unless defendant was otherwise notified in writing, and in advance, the total value of the property plaintiff intended to store in unit 1046 would not exceed $5,000. (Notice of Motion, Exhibit H). Plaintiff further represented that he understood that as occupant of the unit, defendant's maximum liability would not exceed $5,000. Furthermore, plaintiff, by virtue of the lease, agreed that he would defendant harmless "from and against any and all claims, damages, costs, and expenses, including attorneys' fees arising from or in connection with Occupant's use of the Storage Unit" (id.).

On July 10, 2005, plaintiff claims that the property stored in unit 1046, which at the time consisted of over 120 rugs and

other merchandise, was severely damaged by water which entered the storage unit through one of unit's walls (see, Complaint, Affirmation of David I. Aboulafia in Support of Cross-Motion, p.2). In January of 2006, plaintiff commenced this action for property damage. Advancing two causes of action against defendant, plaintiff seeks $161,165.00 in damages predicated upon theories of negligence and private nuisance.

In response to plaintiff's complaint, defendant served plaintiff with a verified answer containing fourteen affirmative defenses ranging from improper venue (Eleventh Affirmative Defense) to claims of liability limitation based on language set forth in the agreements executed by plaintiff for the leased storage unit (Fourteenth Affirmative Defense). Defendant however, never moved to dismiss plaintiff's complaint based on any of their asserted affirmative defenses. Instead, the parties continued through the discovery phase, which eventually resulted in plaintiff's admission that the items stored in self storage unit 1046 and claimed damaged on July 10, 2005, were never actually paid for by the plaintiff (See, Notice of Cross-Motion, Affidavit of Ismael Momeni, Exhibits A and B). The instant motion and cross-motion followed.

Discussion

As a preliminary matter, the court first addresses, and grants, the portion of plaintiff's cross-motion which seeks to

strike defendant's affirmative defense of lack of standing. Simply stated, since defendant failed to raise this defense in either their answer or in a pre-answer motion to dismiss, they are now precluded from raising this defense now (see, CPLR 3211(e)).

Turning to the issue of liability limitation, the court notes that contrary to plaintiff's arguments, when the parties executed a lease for the storage unit in defendant's facility, the lease did **not** create either a landlord-tenant or a bailor-bailee relationship. What it created, as defined under New York Lien Law § 182, was the relationship of an owner of a self-storage facility and an occupant of a self-storage facility (see, Lien Law §182; Westcom Corp. v. Greater New York Mutual Ins. Co., 41 Ad3d 224 [1st Dept 2007]). The distinction is significant, because under the Lien Law, self-storage lease clauses containing limitations of liability or "hold harmless" provisions are enforceable (see, Levy v. Morgan Brothers Manhattan Storage Company, Inc., 204 AD2d 695 [2nd Dept 1994]; Goldberg v. Manhattan Mini Storage Corporation, 225 AD2d 408 [1st Dept 1996]).

The agreement at the core of this action contains both a limitations of liability clause and a hold harmless clause which plaintiff acknowledged not once, but twice when the lease was executed. Furthermore, despite plaintiff's claims to the

contrary, both liability limitations were identified and referenced in defendant's answer as part of defendant's fourteenth affirmative defense, which reads in pertinent part:

> Thirty-Fifth: Prior to July 10, 2005, plaintiff entered into a self-storage lease agreement with Shurguard. Shurguard will beg leave of court to refer to the agreement at the time of trial.
>
> Thirty-Sixth: In the agreement, plaintiff represented to Shurguard that the total value of all property stored or to be stored in the future in the storage unit to be used by plaintiff was less than $5,000. Plaintiff agreed that the maximum liability of Shurguard for any claim or suit by plaintiff for, inter alia, damages to property in the unit was $5,000.
>
> Thirty-Seventh: Pursuant to the agreement entered into between plaintiff and Shurguard, the maximum liability of Shurguard for any claim or suit for damages to the property stored in the unit occupied by plaintiff is $5,000.
>
> Thirty-Eighth: Accordingly, any liability by Shurguard for the alleged damages to plaintiff's property is limited to $5,000.

(Verified Answer, Notice of Motion, Exhibit C).

The raised defense is significant for two reasons. First, the mere fact that plaintiff himself entered into an agreement where he twice initialed these liability provisions severely undermines his claims of "surprise" and "prejudice" if defendant were allowed to rely upon the liability provisions in defense to this action. Second, and more importantly, the liability provisions are enforceable, and therefore warrant the granting of

an order of partial summary judgment limiting defendant's liability, if any, to $5,000 as delineated in the provisions of the executed self-storage agreement.

The court cannot however grant summary judgment in entirety due to the cloud of questions hovering over the issue of property ownership. A party cannot claim damages for property it does not own, and plaintiff, who has admitted that he has not paid for the items he claims were damaged, cannot conclusively establish ownership based solely upon the presentation of two invoices from non-party Asian Handi Crafts Import, Inc. (See Notice of Cross-Motion, Exhibit B; see also, Symbol Press, Inc., v. S&L Properties Assoc., 183 AD2d 634 [1st Dept 1992]("Mere possession of property, does not create an insurable interest therein absent proof of a direct loss by the insured resulting from destruction of the property"); *lv. to. appeal den.*, 81 NY2d 776 [1993], *rearg. den.*, 81 NY2d 990 [1993]). If anything, the submissions on the record concerning plaintiff's ownership of the items claimed destroyed, raise more questions than they answer and as such, precludes an award of summary judgment (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial, [James Publishing 2007] §37:91-92).

Accordingly, it is

ORDERED that defendant's motion for summary judgment granted solely to the extent of limiting liability at trial, if any, to $5,000 as set forth in the terms of the storage unit agreement; and it is further

ORDERED that the balance of defendant's motion is denied; and it is further

ORDERED that the portion of plaintiff's motion seeking an order granting defendant's affirmative defense of lack of standing is granted; and it is further

ORDERED that the balance of plaintiff's motion is denied; and it is further

ORDERED that the Clerk of Court enter judgment accordingly.

Counsel for the parties are directed to appear for a Pre-Trial conference at 11:00 a.m. on May 1, 2009 in IA Part 15, Room 335, 60 Centre Street, New York, New York.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/11/09

HON. WALTER B. TOLUB, J.S.C.